92-123

No. _____

Supreme Court, U.S.
FILED
MAY 16 1992

IN THE

Supreme Court of the United States

October Term, 1991

EARLUS LEON WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Where validity and nature of prior convictions were not affirmatively determined on the record at sentencing, whether such prior convictions were improperly used to establish the "Career Offender" of the defendant.

II. When the sentencing Judge incorrectly believed that he lacked authority to consider defendant's mitigating circumstances as well as his own discretion to deviate from Sentencing Guidelines, whether the Lower Court failed to adequately consider the offender characteristics pursuant to the Sentencing Guidelines and Policy Statements.

PARTIES BELOW

Petitioner, EARLUS LEON WILLIAMS, *Defendant-Appellant.*

Respondent, UNITED STATES OF AMERICA, *Plaintiff-Appellee.*

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No. _____

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OPINIONS BELOW

There are no other reports of opinions delivered in this case other than the Sixth Circuit Opinion which can be found in the Appendix at A1.

JURISDICTION

The Per Curiam Opinions, of the United States Court of Appeals for the Sixth Circuit, dated and entered on March 18, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part the Sentencing Reform Act of 1984 [ ] recites:

Paragraph 4B 1.1 Career Offender:

(A) Defendant is a Career Offender if

(1) the defendant was at least 18 years old at the time of the instant offense.

(2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense.

(3) the defendant has at least two prior felony offenses of either a crime of violence or a controlled substance offense . . . . (emphasis added).

In pertinent part, the United States Sentencing Guidelines, recites:

Section 4B 1.2, Definitions of Terms Used in Section 4B 1.1:

(1) the term "crime of violence" means any offense under Federal or State Law punishable by imprisonment for a term exceeding one (1) year that—

(I.) has and as an element the use, the attempted use, or threatened use of physical force against the person of another, ...

In pertinent part, the Sentencing Reform Act of 1984 [18 U.S.C. par. 3661] recites:

"No limitation shall be placed on the information concerning the background, character, and conduct of the defendant."

In pertinent part, the United States Sentencing Guidelines, at the Policy Statements, recites the following:

> U.S.S.G. par. 5H, p.s. . . . the Senate Report 98.225
>
> Guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.

STATEMENT OF THE CASE

Petitioner had been indicted on felony charges of a felon in possession of a firearm; possession of cocaine with intent to distribute; and possession of a firearm in relation to a drug trafficking offense thereto [18 U.S.C. par. 924 (c)]. On December 17, 1990, in the United States District Court for the Northern District of Ohio, he plea bargained, changing the plea of guilty to the possession of cocaine with intent to distribute and to possession of a firearm in relation to drug trafficking offense.

Sentencing occurred in the United States District Court for the Northern District of Ohio Eastern Division on February 2, 1991. At this hearing, there was extensive discussion as to the following two issues:

(1) The nature of the prior State convictions attempted to be presented by the prosecution for purposes of establishing a "Career Offender" under the Sentencing Guidelines;

(2) Numerous statements by the sentencing Judge as to his freedom and discretion to sentence the Defendant as he was given to believe he was required to do as mandated by the Sentencing Guidelines.

At Sentencing Hearing on January 28, 1991, the sentencing Judge took meticulous effort to review the documents of record from the State court convictions, in order to inquire as to whether those convictions fulfilled the "Career Offender" requirements as to convictions of drug charges or violent crimes. Although a lengthy hearing was had regarding these issues, neither did the court come to an accurate determination of the Career-Offender issues, nor did the prosecution, more importantly, meet its burden in this regard. Without hearing evidence, without hearing any proof or testimony

or documentation from the prosecution, the sentencing court erroneously made a finding that the requisite crime-of-violence State convictions were present in the defendant's criminal history, *based on statutory definitions only*:

> So that I think now, unless I hear anything to the contrary, I have to conclude that those offenses [two 1981 Aggravated Robbery convictions], plus the later drug offense appear, Mr. Williams, to bring you under the career criminal law.
>
> Now, as I read the facts of those cases, for example, the fact that the robbery charge involved apparently some woman whose house you painted, according to what I quickly read, I don't know, but you pled guilty to those at that time, and they are on the journal entries that you pled guilty to Aggravated Robbery, and that does, indeed, *under the very definition of Aggravated Robbery*, constitute a crime of violence (Sentencing Hearing of January 28, 1991, at page 24) (Emphasis added).

The above lengthy quotation from the transcript is given in order to indicate to this Honorable Court the factual basis for Part A of the Argument, below, indicating that the sentencing Judge had not a factual basis sufficient to establish a "crime of violence" conviction as a precondition to sentencing the defendant as a Career Offender.

With reference to Part B of Argument, below, this Honorable Court is respectfully directed to the following from the sentencing transcript:

> [The Court]: As much as I would have preferred to have been able to sentence Mr. Williams under the Probation Report for a much shorter term than a

> nineteen (19) year sentence, that's a long time .... that's what the law says, I have no .... under the new Sentencing Guidelines, *I have no discretion at all imposing a lesser sentence.* That's the way it is. (Sentencing transcript at page 26) (emphasis added).

The above transcripts illustrate the urgent need for this Honorable Court to settle the important question of the discretion of a sentencing Judge to depart downward from the Sentencing Guidelines where there are mitigating circumstances and personal characteristics of the defendant and his history, especially where the sentencing Judge indicates strongly in the record his preference to assert such a downward departure (see Part B of Argument below).

ARGUMENT

A. The United States Court of Appeals for the Sixth Circuit Has Decided an Important Question of Federal Law, Which Has Not Been, But Should Be Settled By This Court; and in So Doing, Also Rendered a Decision in Conflict with Decisions of Other Courts of Appeals on the Same Matter.

The United States Court of Appeals for the Sixth Circuit has rendered a decision that is squarely in conflict with the following below listed decisions of other Circuits. On the issue of a prior conviction used for sentencing purposes to establish a "crime of violence", and in particular the crime of Aggravated Robbery:

(1) 5th Circuit (1989): *U.S. v. Flores*, 875 F.2d 110

(2) D.C. Circuit (1989): *U.S. v. Basin*, 886 F.2d 383 (*cert. denied*, 110 S. Ct. 1831 (1990).

(3) 10th Circuit (1990): *U.S. v. Brunson*, 907 F.2d 117

This crime of violence/Aggravated Robbery issue has not been addressed previously by this Honorable Court. As discussed above in Statement Of The Case, insufficient evidence was presented by the prosecution to meet its burden of showing the violent nature of the prior state conviction.

Petitioner respectfully urges acceptance of review by this Honorable Court on certiorari, to consider and determine whether a prior conviction was improperly used to establish "Career Offender" of the defendant, (1) when the validity in nature of the prior conviction was not affirmatively determined on the record, at the sentencing; (2) whether "Career Offender" was

improperly determined by the sentencing court, when the prosecution failed to meet its burden of proving that a prior state conviction constituted a crime of violence.

Furthermore, this Honorable Court, in considering the above issues, is respectfully directed to:

U.S. v. Jones, 907 F.2d 456 (4th Cir. 1990);
U.S. v. Scarborough, 777 F.2d 175 (4th Cir. 1985);
U.S. v. Williams, 892 F.2d 296 (3rd Cir. 1989);
U.S. v. McNeal, 900 F.2d 119 (7th Cir. 1990);
U.S. v. Thompson, 891 F.2d 507 (4th Cir. 1989).

B. The United States Court of Appeals for the Sixth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be Settled By This Court; and in So Doing, Also Rendered a Decision in Conflict With Decisions of Various United States Courts of Appeals on the Same Matter.

The United States Court of Appeals for the Sixth Circuit, in affirming conviction of Petitioner, has rendered a decision that is squarely in conflict with the below listed decisions by various Courts of Appeals, on the issue of, when there is an incorrect belief by the sentencing court as to authority to consider Defendant's mitigating circumstances to permit deviation from the Sentencing Guidelines, whether the court failed to adequately consider the offender characteristics pursuant to the Sentencing Guidelines and Policy Statements:

(1) 8th Circuit (1990): *U.S. v. Brown*, 903 F.2d 540.

(2) 1st Circuit (1989): *U.S. v. Russell*, 870 F.2d 18.

(3) 3rd Circuit (1990): *U.S. v. Rosen*, 896 F.2d 789.

(4) 4th Circuit (1990): *U.S. v. Rogers*, 897 F.2d 134.

(5) 8th Circuit (1990): *U.S. v. Evidente*, 894 F.2d 1000.

(6) 10th Circuit (1990): *U.S. v. Lowden*, 900 F.2d 213.

(7) 11th Circuit (1989): *U.S. v. Fossett*, 881 F.2d 976.

(8) D.C. Circuit (1990): *U.S. v. Ortez*, 902 F.2d 61.

This issue as to incorrect belief regarding the ability to depart downward from the Sentencing Guidelines has not been previously addressed by this Honorable Court. In the present case, the sentencing Judge incorrectly

believed he had no authority to depart downward, and, although indicating he desired to depart downward from the Guidelines, he failed to do so. In particular, he failed to consider the "Policy Statements" which are part of the Sentencing Guidelines. Had the sentencing Judge recognized his freedom to downward depart, and then subsequently consider the Policy Statements under the Guidelines, the record shows that the sentencing Judge would in fact have given a much lighter sentence in light of mitigating circumstances and other facts of the case.

Petitioner respectfully urges acceptance of review by this Honorable Court, on certiorari, to consider and determine (1) whether the sentencing Judge can downward depart from the Sentencing Guidelines, when there are mitigating circumstances embraced by the Policy Statements of the Guidelines; and (2) whether the sentencing Judge has discretion to depart from the Guidelines, when he is familiar with all of the facts of the case, the personal history and characteristics of the Defendant, and states on the record that he "would have preferred to have been able to sentence Mr. Williams under the probation report for a much shorter term than a nineteen (19) year sentence, that's a long time." (Sentencing transcript, pg. 26).

In support of the above issues, Petitioner respectfully directs this Honorable Court to:

(1) 3rd Circuit (1990); *U.S. v. Denardi*, 892 F.2d 269.

(2) 3rd Circuit (1989); *U.S. v. Medeiros*, 884 F.2d 75.

(3) 4th Circuit (1990); *U.S. v. Wilson*, 896 F.2d 856.

(4) 4th Circuit (1990); *U.S. v. Bayerle*, 898 F.2d 28.

(5) 10th Circuit (1990); *U.S. v. Davis*, 900 F.2d 213.

CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for certiorari for the following reasons:

(1) Petitioner's prior history of convictions from state cases were not properly factually determined by the Trial Court to be accurately considered in establishing the "Career Offender" status of Petitioner for sentencing purposes.

(2) The trial Judge below had an inaccurate belief that he had no power to depart downward from the Sentencing Guidelines due to consideration of Petitioner's personal history and characteristics.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 18, 1992)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is reproduced.*]

No. 91-3152

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EARLUS LEON WILLIAMS,
Defendant-Appellant.

ORDER

BEFORE: GUY and RYAN, *Circuit Judges*, and JOINER, *Senior District Judge.**

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

* The Honorable Charles W. Joiner, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

Earlus Leon Williams pleaded guilty to possession of cocaine with the intent to distribute, in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(C), and to having a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. §924(c). Williams received a 228 month sentence and this appeal followed. The parties have briefed the issues and have agreed to waive oral argument.

Upon consideration, we find no merit to this appeal. Counsel for Williams raises several issues, all of them dealing with the sentencing guidelines. We have reviewed the record and law and are satisfied that Williams was correctly adjudged to be a career offender under U.S.S.G. §4B1.1 and that the sentence was regular in all other respects. Williams's contention that the trial judge failed to depart downward is not cognizable. *United States v. Gregory*, 932 F.2d 1167, 1168-69 (6th Cir. 1991).

Accordingly, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

A3

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed January 29, 1991)

Case Number: 1:90CR0078-001

UNITED STATES DISTRICT COURT

Northern District of Ohio

UNITED STATES OF AMERICA

V.

EARLUS LEON WILLIAMS
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or
After November 1, 1987)

Robert T. Lynch
Defendant's Attorney

THE DEFENDANT:

[x] pleaded guilty to count(s) Two and Three of the Indictment.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	*Nature of Offense*	*Date Offense Concluded*	*Count Number(s)*
21:841(a)(1) & (b)(1)(C)	Possession of cocaine w/intent to distribute cocaine	2-12-90	2
18:924(c)	Firearm in relation to drug trafficking offense	2-12-90	3

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[x] Count(s) One (is)(are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $100.00 for count(s) two & three, which shall be due [x] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
294-58-4625

Defendant's Date of Birth:
3-4-60

January 28, 1991
Date of imposition of Sentence

Defendant's Mailing Address:

/s/ WILLIAM K. THOMAS
Signature of Judicial Officer

Lake County Jail
Painesville, Ohio

William K. Thomas
United States District
Senior Judge
Name & Title of Judicial Officer

Defendant's Residence Address:

3778 Freemont
South Euclid, Ohio 44121

29 Jan 91
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 228 MONTHS.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at _____ a.m. / p.m. on _____

[ ] as notifed by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.

[ ] as notified by the United States marshal.

[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

United States Marshal

_____

County Marshal

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 30

Criminal History Category: VI

168-210 count two to run consecutive with count three mandatory 60 months

Imprisonment Range: 228 to 270 months
Supervised Release Range: 3 years (drug after care)

Fine Range: $0 to $_____

[ ] fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $0

[x] Full restitution is not ordered for the following reason(s):

not in issue.

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[ ] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

TRANSCRIPT OF SENTENCING HEARING

CR 90-78

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

V.

EARLUS LEON WILLIAMS,
Defendant.

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE WILLIAM K. THOMAS,
JUDGE OF SAID COURT, ON MONDAY,
JANUARY 28, 1991 COMMENCING
AT 9:00 A.M.

APPEARANCES:

For the Government:

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Cleveland, Ohio 44114

For the Defendant:

Robert T. Lynch, Esq.
711 Statler Officer Tower
Cleveland, Ohio 44115

[2] MONDAY, JANUARY 28, 1991 AT 9:00 A.M.

THE COURT: Even though Mr. Williams is not here, but on his way, I think we can use the time to try to sort out where we are in terms of sentencing.

I think we will start with the probation officers. Who will speak?

MR. MARTIN: I will.

THE COURT: Mr. Martin. You recall Mr. Martin, you were present back on the 17th of December, and at that time, according to my notes, Mr. Mart Cain made the statement that—well, I'm not sure who made this statement, but my notes show that Count 2 would permit a term of imprisonment of not more than 20 years under 841(b)(c) and a fine of not more than a million dollars.

Then I raised the question, "Any discussion as to the particular number of years based on the sentencing guidelines?" And I was told the following; that it was the Government's position that Mr. Williams is a career criminal, calls for an offense level of 32, and recommended that the Defendant be given two points for accepting responsibility which reduces the offense level to 30.

Because of career offenses, that would result in a sentencing range of 168 to 210 months, and that they would recommend at the lower end of that, namely 168 months, the lowest end of the range.

[3] And as to Count 3 you add on months under the terms of 924(c), which adds up to a total of 228 months and that's what Mr. Williams plead guilty to?

MR. MARTIN: Yes, sir.

THE COURT: Now, you have investigated, and have submitted a presentence report, and what can you tell me?

MR. MARTIN: Your Honor, the officer that conducted the presentence investigation, Miss Worlds, ran into some difficulty in terms of verifying the details of the offense; that would be Paragraph 19 of the presentence report, aggravated robbery.

We had in mind the guideline of 4B1.1, career offender, in which they speak of a crime of violence.

Miss Worlds, in attempting to track down the details of the offense, contacted the Defendant, he could not recall.

She went to the the Common Pleas Court, criminal records room, where the grand jury information is contained, and the various other agencies within the Court of Common Pleas in an attempt to determine the details.

We were not so able to determine those details, and based upon that factor, your Honor, the lack of information concerning the offense and the aggravated nature of that offense, we moved away from the career offender status because we weren't certain what the crime of violence was.

THE COURT: Are you saying the Prosecutor's [4] Office has no file on the case?

MR. MARTIN: The details, they can't locate anything on it, sir. What they have is the journal entries concerning the actual sentence, but not the details.

The officer was told that they don't maintain their records now beyond—

MS. WORLDS: From 1975 to 1982, during those years.

THE COURT: What happened during those years?

MS. WORLDS: In terms of the information that is normally obtained from the grand jury's room relative to the circumstances of an offense—

THE COURT: Well, the grand jury would only return an indictment, you wouldn't get anything else out of the grand jury. What does the indictment call for? Somewhere there must be a copy of the indictment, what did it call for?

MS. WORLDS: The information that I received in terms of the conviction had to do with—came from the Cuyahoga County, Common Pleas Court, clerk's office.

THE COURT: You say you got a copy of that?

MS. WORLDS: I don't have a copy. That information was obtained and given to me, or verified to me after obtaining initially from the BCI report that we also run in terms of obtaining convictions, arrests.

[5] THE COURT: You didn't get an actual copy—

MS. WORLDS: I did not get an actual copy.

THE COURT: —of the journal entry of the conviction?

MS. WORLDS: No, I did not.

THE COURT: Of what he was convicted of?

MS. WORLDS: No, I did not.

THE COURT: Is that available?

MR. MARTIN: Yes, it is available.

THE COURT: The clerk's office would be able to dig that out for you. All right, now that's the first offense.

Well, then, to the extent that you did get information, what does that information indicate on that 5/14/'81 charge which is criminal Case No. 15428, what did you find out about it?

MS. WORLDS: Your Honor, what I found out is that both the CR No. 165428, as well as the next case number, CR 166881 were both—the Defendant was convicted at the same time of both charges.

THE COURT: In other words, he received a concurrent sentence?

MS. WORLDS: Yes, sir.

THE COURT: What did you find out about whatever you got?

[6] MS. WORLDS: As to the details of the offense?

THE COURT: Yes. As to the offense.

MS. WORLDS: It was same as relative to the first case number.

THE COURT: What did you find out?

MS. WORLDS: That he was convicted on 11/3/81.

THE COURT: Of what offense?

MS. WORLDS: Kidnapping, grand theft, aggravated robbery.

THE COURT: So it does have that?

MS. WORLDS: Yes, it does have that, your Honor.

THE COURT: But you are saying as to whether or not indeed he did use a gun, or whether he used any weapon or tool, that might have constituted an act of violence, you didn't find that?

MS. WORLDS: I was unable to obtain that particular information.

THE COURT: Now, the second offense involved some event of August 6th, 1981, Criminal Case No. 166881, and that apparently involved charges of kidnapping, grand theft, aggravated robbery, and you are saying that you couldn't find anything on that offense either?

[7] MS. WORLDS: Relative to the circumstances, no, I could not, your Honor.

THE COURT: Did you find out that he was sentenced to two, four to 25 year prison sentences?

MS. WORLDS: Yes, your Honor, concurrent with the other cases, each case, your Honor.

THE COURT: Two of them?

MS. WORLD: Yes.

THE COURT: And he actually only served a year and seven months and six days?

MS. WORLDS: The only information that I did obtain was that he was sentenced to the four to 25 years.

THE COURT: But you didn't find out how long he served?

MS. WORLDS: He had a parole date—

THE COURT: I am reading from a letter that Mr. Williams wrote me, and he says that he served one year, seven months and some days.

MS. WORLDS: And we have down here a parole date, 7/12/84. I'm sorry, 5/31 of '83. Then he was finally released 7/12 of '84.

THE COURT: Well, now let's go on then to the next offense that you have listed in your criminal history Part B section and that's an offense of 8/19/84, a drug offense, and you don't give the section under which he was [8] prosecuted, but you do entitle the drug law offense, so that at least that particular offense, being a drug offense, would satisfy 4B1.1?

MR. MARTIN: Yes, sir.

THE COURT: Subparagraph 2, "The incident offense is a felony that is either a crime of violence or a controlled substantive offense," so it would satisfy the second part of that, is that right?

MR. MARTIN: Yes, sir.

THE COURT: So the whole issue here is that whether or not, indeed, he was convicted of a crime of violence?

MR. MARTIN: Yes, sir.

THE COURT: It's evident that we are going to have to do some more checking, but let's hear from the Government.

MR. SIERLEJA: Your Honor, if I may, I don't believe there was any question that there was a conviction for aggravated robbery under Ohio law.

I would simply state under Ohio Revised Code 2911.01 aggravated robbery, by definition, "is no person in attempting or committing a theft offense as defined in Section 931.01 of the Ohio Revised Code, or in fleeing immediately after such attempt offense, shall do either of the following: Have a deadly weapon, or dangerous ordinance as defined under the [9] Ohio Revised Code, or inflict or attempt to inflict serious physical harm." That's aggravated robbery under Ohio's law.

There is no question the Defendant was convicted of aggravated robbery. By definition, he has the prior aggravating, or violence, prior conviction under Ohio Revised Code by definition.

I don't believe there is anything in the guidelines that called for a finding of facts again to substantiate the underlying offense. This is, in fact, a plea. I don't believe defense counsel will take exception with the fact that there was an aggravated robbery conviction.

The guidelines under 4B1.2 simply speak of the term crime of violence means any offense under Federal or State law punishable by imprisonment for a term exceeding one year; that has as an element the use.

We are not talking about the underlying facts, just that it has an element of the use, attempted use or threatened use of physical force.

Again referring back to Ohio Revised Code, that, by definition, is in that particular section. Whether it was a plea to A1 or A2 of the Ohio Revised Code. That's why I'm a little lost as to what the problem is here.

By definition he has the two prior convictions; both an offense of violence and of drug trafficking. If you follow this logic that would mean in any of these cases, drugs [10] included, we would have to bring forth apparently witnesses to come into Court and testify in

terms of the underlying facts to cases which the individuals already plead to. And a case of aggravated robbery, by definition, it's been met.

I really don't have anything else to offer at this point. I believe it's all pretty clear on its face, unless you have some other questions for me, your Honor.

THE COURT: Let me ask, Miss Worlds, did you talk with the State probation office, I mean the County probation office, they often have presentence reports also on those crimes; did you speak with that office?

MS. WORLDS: To the best of my recollection, your Honor, I do not remember speaking with anyone in that department, but checking with the clerk's office, there is a records department that is kept, and the information, when I requested the information, where I could obtain the information, I was referred to the clerk's office in terms of the information relative to the case at which time, or at which place I obtained the conviction and the dates of conviction.

THE COURT: Well, we are going to take a recess, and I am going to direct you to do two things.

One, call the County probation office and see if, indeed, there is a probation presentence report on Mr. Williams for those two offenses; either one or the other [11] of those two offenses for which he was sentenced.

And then the second thing, we are going to check out the journal entry which is what we should have here.

So any possible confusion would be clarified by, indeed, what the journal entry shows.

MS. WORLDS: Yes, your Honor.

THE COURT: That would appear under those numbers. I don't know whether the clerk's office can fax that to us or not, but we will try to get it.

MR. SIERLEJA: Your Honor, if I may, it is a certified copy. I have the journal entry from the aggravated robbery.

THE COURT: You do?

MR. SIERLEJA: It came in with our investigative file.

THE COURT: Let's see it.

MR. SIERLEJA: That's what I was getting at, I don't believe there is any question. Perhaps, I should direct it to Mr. Lynch, that there is, in fact, an aggravated robbery conviction.

MR. LYNCH: No question. But as to the definition that I read, I still don't think we have the requirements of the career criminal in a 4B1.1. He is talking about intent under the Ohio statute.

As far as one of the possibilities under aggravated [12] robbery, intent to use violence, that does not meet the requirement of the career criminal statute referring to use of or attempted use of force. There is a difference there.

I think we need to know the facts of this particular case, not just go on the definition which the prosecutor is trying to—

THE COURT: No, I think probably, Mr. Lynch, we can go behind the journal entry. We can't go behind the journal entry and go into the facts of whatever Judge Richard McMonagel considered when he accepted his plea. He plead guilty, and this journal entry, would you please photocopy this?

Do you have a copy of this?

MR. LYNCH: No, I don't.

THE COURT: Make three copies. In the meantime we will take a break and please call the probation office and see if there is anything in their records that will be of help.

(Short recess taken.)

THE COURT: While we are waiting for Mr. Williams to arrive, we can discuss the matters that we discussed earlier.

Now, Miss Worlds, I asked you to get in touch with the State or County probation office, did you do that?

MS. WORLDS: Yes, your Honor, I did, what I [13] found as stated earlier, there was no information relative to the probation intake department, or the records department which would show that a case was referred to them under either case number.

In other words, there were no circumstances available due to the fact that there were no reports.

THE COURT: Is it possible the Court did not refer the Defendant for a presentence report?

MS. WORLDS: Yes, your Honor, that could be possible. That is possible.

THE COURT: Well, now that you have received a copy of of the journal entry, State of Ohio versus Earlus Williams, that goes back to November 17, 1981, when Mr. Williams appeared before Judge Richard J. McMonagel with being charged with aggravated robbery, a violation of Section 2911.01 and plead guilty to that, have you and Mr. Martin had an opportunity to reconsider your report?

MR. MARTIN: Yes, sir, based upon the information provided by the Government, and looking at the situation, I would think, your Honor, that perhaps the career offender situation is applicable in this case.

As I indicated to the Government, our concern was that we wanted to be sure, and we didn't want to take it lightly and enter into the situation without having the full information to provide the Court at the time of sentencing; [14] that was our major concern.

THE COURT: Well, now having seen this, and you are working with the sentencing guidelines right along, does he, or does he not, fall within the guideline 4B1.1, a career offender?

MS. WORLDS: Yes, your Honor, he does.

THE COURT: Well, it is evident that a new probation report, presentence report, needs to be prepared to conform to your oral statements here.

Mr. Lynch, do you have any comments on this?

MR. LYNCH: Well, reluctantly, I have reviewed the definitions of Ohio Revised Code, Section 2911.01 aggravated robbery, and also 2911.02, robbery, and as was suggested by the prosecutor earlier, your Honor, it seems like the very definitions of those offenses do entail what is described in the career criminal statute under the sentencing guidelines, and therefore, like I say, very reluctantly, I have to agree with the Probation Department's assessment that the career offender definition is fulfilled here.

I am trying to grasp for some definition way out of that, but in studying the definition of aggravated robbery, your Honor, it seems like either use of force, or an attempted use of force, or an infliction of the use of force; these things are all that is required, and since the Defendant did plead guilty to those definitions, I don't want to be arguing [15] the prosecution's case here, it is hard for me to attack the position taken by the Probation Department.

THE COURT: What interests me, coming back to Miss Worlds, to your report, is Judge McMonagel's last sentence, "It is further ordered that said Defendant be referred to the Probation Department for a presentence investigation and report."

MS. WORLDS: Looking at this, your Honor, I noticed the same thing, but again I have checked two times with that department, and they have indicated to me that there was no report; that the cases were not referred.

Again, first I checked with the intake department and they classified their cases according to their own probation number. And in their computer, they could not find information relative to those case numbers. And at that time they connected me to the records department itself where, if there is actual files there, it would be under those case numbers, and there would be reports to reflect that and we would obtain the reports, and in return gather the details of the offense. Another check indicated that there were no reports there.

THE COURT: Now, wait a minute. I am looking at a different one, this is the second one, I guess. This is the drug law offense and Judge Angelotta referring the same way with Judge McMonagel. You mean in each of these two [16] cases, the Probation Department does not have a report? Did you check both or just one?

MS. WORLDS: Your Honor, I just checked the first two entries?

THE COURT: How about the third one?

MS. WORLDS: I can double check that one.

THE COURT: Because that would pick up his earlier records. If, indeed, there is a presentence report in the drug case, that would pick it up. Mr. Martin.

MR. MARTIN: Your Honor, the probation number assigned to a client at the time of intake follows the client all the way through the County probation system and it would reflect any cases that have been done under that particular number.

I don't think there is a way they would change that probation number all the way through.

THE COURT: So you have two Common Pleas Judges that referred him to probation, and you are saying was in their instance, there was a presentence report?

MS. WORLDS: That's what we were told, your Honor.

THE COURT: That's hard to understand. Who is the present chief probation officer?

MR. MARTIN: I know the Deputy Chief, Kenneth Glenn, your Honor. I can't think of who the current [17] chief is.

THE COURT: Well, I am going to check this out. We will go into chambers, and I will make a call down there and have people in chambers with a Court Reporter.

I was a Common Pleas Judge for 15 years, and I can't believe that something like this would not be reflected somewhere in the Probation Department.

But every day I learn some new things and maybe this is one of those days. So we will take the time waiting for Mr. Williams to pursue this further.

(In Chambers, telephone conference.)

THE COURT: Mr. Glenn?

MR. GLENN: Yes.

THE COURT: This is William K. Thomas, one of the U.S. District Judges.

MR. GLENN: Yes, your Honor.

THE COURT: I have a case in front of me involving a man named Earlus, E-A-R-L-U-S Williams, and in my chambers are two of our Probation Department officers, Mr. Norris Martin and Miss Sharon Worlds, also counsel for the Government, an Assistant U.S. Attorney, and also counsel for Earlus Williams.

I'm about to sentence Mr. Williams this morning and the reason I call is because we have not been able to discover a probation presentence report in your department in three [18] different felonies in which the Judge referred the Defendant, Earlus Williams, for a presentence report.

MR. GLENN: Okay, Judge.

THE COURT: And Miss Worlds has made an effort to check them and has been unable to locate them. I wanted to be sure we do have them.

MR. GLENN: Can you give me a docket number for those cases?

THE COURT: I have the journal entries in front of me, will that be what you want?

MR. GLENN: Yes. Do you have a docket number on each of those journal entries?

THE COURT: Where is the armed robbery that we have? The first number is 15428.

The second number is 16881.

And the third number is 193209.

MR. GLENN: Judge, if you give me about five minutes I could check to make sure and get back to you. What is your telephone number?

THE COURT: 522-4350.

MR. GLENN: Judge, I'll check them out right away for you, sir.

THE COURT: Thank you.

(Telephone conference resumed.)

MR. GLENN: Hello, Judge, this is Ken Glen [19] over at the Court of Common Pleas. Yes, we do have a presentence report in docket number 193209, trafficking in drugs, and Case No. 73612.

And I'm in the process of having our clerk get a copy if you need it.

THE COURT: Do you have a fax machine?

MR. GLENN: Yes, we do have a fax machine.

THE COURT: Maybe you could fax it over here to our fax?

MR GLENN: I think we can.

What is your number over there?

THE COURT: 522-2140.

MR. GLENN: Okay. We are Xeroxing it now and will have it faxed over to you.

THE COURT: I do appreciate it. You only have it in the one case?

MR. GLENN: In the one case, Judge.

THE COURT: Okay. Very well. Thank you very much.

MR. GLENN: All right.

(End of telephone conversation.)

THE COURT: The record may show that as Mr. Glenn reports, there appears to be only one probation report, or a presentence report involving Mr. Williams, and we will get that from our fax momentarily.

[20] And when I get it, I'll permit counsel for both parties, as well as our Probation Department, to examine it. Okay.

(End of In Chambers.)

THE COURT: Several motions were filed by counsel for Earlus Williams.

One is entitled, motion for dismisall due to double jeopardy.

And the other is a motion to serve time in the form of house arrest.

And they say that Mr. Williams has written me a letter, which I read several times, which consists of six pages, that relates to the various matters that correspond with his prior criminal history.

The record should also show that I received a letter from a teacher for one of Mr. Williams' children, and I talked with that teacher about the situation. I am quite aware of the traumatic affect, emotional affect, on the child who is in the classroom in, I believe, South Euclid.

First of all, therefore, I take up the motion for dismissal due to double jeopardy.

Mr. Lynch has filed a brief or memorandum, and citing among other cases, Brown v. Ohio, 43 U.S. 161, and just as he indicates, it certainly does indicate that with reference to a prosecution of different State offenses where [21] one has been prosecuted for a lesser included offense under certain circumstances, that to prosecute that same person, or the major offense, is treated as a violation that there is a double jeopardy cause of the Fifth amendment.

However, we are not dealing with that situation here, rather we are dealing with the application of the double jeopardy cause of the Fifth amendment to offenses that are brought under two different sovereigns.

What we are dealing with here is whether or not, because Mr. Williams may be facing charges under State law for the same offenses for which he is being charged with here, if those facts were to be borne out, whether or not the double jeopardy clause applies in two well-known cases that of Bartcus, B-A-R-T-K-U-S v. Illinois and Abbat, A-B-B-A-T v. United States, that case is found at 459 U.S. 121 and 459 U.S. 187, the Supreme Court held that Federal prosecution was not barred under the double jeopardy cause of the Fifth amendment by the earlier conviction in the State Court.

And then more recently, the Court, in the case of United States v. Wheeler, re-examined those cases, and relied on them in connection with an American Indian who was found guilty in a tribal Court and then prosecuted under a Federal law which had to do with taking, or having carnal knowledge of a female under the age of 16.

And the Supreme Court held once more that the [22] doctrine of separate sovereigns applies and Justice Potter Stewart, in this case, which is found at 435 U.S. 313 at 316 stated, quote, "In Bartkus v. Illinois, 359

U.S. 121 and Abatt v. United States, 359 U.S. 187, "This Court reaffirmed the well established principle that a Federal prosecution does not bar a subsequent State prosecution of the same person for the same acts and the State prosecution does not bar a Federal one."

The basis for this doctrine is that prosecution under the laws under separate sovereigns do not, in the language of the Fifth amendment, quote, "Subject to Defendant for the same offense to be twice put in jeopardy," end of the quote.

And so under the clearly applicable law of the United States Supreme Court, I must respectfully deny the motion for dismissal due to the double jeopardy.

The second motion has to do with the request that Mr. Williams serve whatever sentence imposed in the form of house arrest.

And I suppose this would really kind of fits under the umbrella of probation, and the difficulty with that is that the very statute under which Mr. Williams is being prosecuted, namely 21 U.S.C. Section 841 provides in all parts A, B and C, "That notwithstanding any other provision of law the Court shall not place on probation, or suspend the [23] sentence of any person sentenced under the provisions of this subparagraph which provides for a mandatory term of imprisonment." That's under C.

Then under B it provides, "Notwithstanding any other provision of law, the Court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph."

So that treating Mr. William's request for house arrest, under the guidance of the Probation Department, as, indeed, a request for probation, the law clearly rejects that option available in this situation.

Coming then to the case in which we now find ourselves, Mr. Williams, before you arrived, we spent considerable time trying to piece out these former State convictions, and we finally received now a very difficult to read copy of the State presentence report in the drug case to which you plead guilty in 1984.

Mr. Ken Glenn apologizes, but says that this came off microfilm and that's why it is so hard to read, but having read as much as I could, it picks up the aggravated robbery conviction from 1981, and I am reading what appears to be Page 4, aggravated robbery with a CCW, Common Pleas Court in Case Number—this is the 15 case. I guess, plead to aggravated robbery, and he was given a four to 25 year sentence by Judge RJ, or Richard J. McMonagel, and concurrent [24] with that was the second aggravated robbery count which was count—this says Count 1 and 3 of the subsequent offense in the year of 1981, I believe, happening in August.

So that I think now, unless I hear anything to the contrary, I have to conclude that those offenses, plus the later drug offense appear, Mr. Williams, to bring you under the career criminal law.

Now, as I read the facts of those cases, for example, the fact that the robbery charge involved apparently some woman whose house you painted, according to what I quickly read, I don't know, but you plead guilty to those at that time, and they are on the journal entries that you plead guilty to aggravated robbery and that does, indeed, under the very definition of aggravated robbery constitute a crime of violence.

And then later you also plead guilty to the drug count which qualifies under the guidelines with reference to drug offenses, namely the incident offense of conviction is a felony and is either a crime of violence or a controlled substance offense.

I will be glad, however, to hear, in addition to anything that we haven't looked into this morning, Mr. Lynch, or anything Mr. Williams wants the Court to look into.

MR. LYNCH: We have nothing additional, at this time, your Honor.

[25] THE COURT: Is there any reason at this time why the Court should not proceed to sentence Mr. Williams?

MR. SIERLEJA: Nothing from the Government's standpoint, your Honor.

MR. LYNCH: No, your Honor.

THE COURT: Very well, Mr. Williams. Let me just ask this, Miss Williams, would you like to, with the probation officer, step up here to the side bar and the mother also of the girls.

(Bench conference on the record.)

THE COURT: This is a very difficult time for you, and I didn't know whether you want the children to be here at the time that I sentenced your husband or not. It's hard for them, I know. You want them to stay?

MRS. WILLIAMS: Yes.

THE COURT: What's happening to your house, are you going to be able to keep it or give it up?

MRS. WILLIAMS: I have to give it up.

THE COURT: How much do you owe on it?

MRS. WILLIAMS: I'm not sure of the payments, almost a year. A couple of times I know he fell to the wayside and has done things wrong, but he is a good man. He is a good man. Because if he wasn't, I wouldn't be here.

THE COURT: Well, we surely looked into this possibility that perhaps the career criminal provisions do not [26] apply; that was the earlier report from the Probation Department, but then the official records

together verified it through the State Probation Department, there is nothing for us to do but to accept what those records show.

As much as I would have preferred to have been able to sentence Mr. Williams under the probation report for a much shorter term than a 19 year sentence, that's a long time.

MRS. WILLIAMS: That sure is.

THE COURT: That's what the law says. I have no—under the new sentencing guidelines, I have no discretion at all in imposing a lesser sentence, that's the way it is.

The only other way is if for some reason he wanted to withdraw his plea of guilty, but I heard the evidence and the police officers found the gun and whether or not there is an explanation. His explanation to me in the letter was he was going to see the DEA officer the next day, and they were going to set this fellow up.

But he had the gun, and he had the bags, 97 grams of cocaine in his car so the police arrested him.

MRS. WILLIAMS: The only thing I can say is I know I have seen a lot of things go on, and you have been fair, and I know that he had gotten shot before working with them, and they gave him no kind of cover, so he was just supposed to being out there get shot, killed, whatever, by [27] himself and that's wrong.

THE COURT: That's why he had the gun.

MRS. WILLIAMS: If you want somebody to help you, you help them.

THE COURT: Well, Mr. Lynch has done everything possible to find a way, there is no way I can see it.

MRS. WILLIAMS: I know he has.

THE COURT: Do you still want your children to remain? You may do as your please, okay?

MRS. WILLIAMS: Would it be possible for him to have a couple of minutes with his children?

THE COURT: I'll talk to the marshalls. When he goes back down to the marshall's office, I don't know how soon they will find a place for him.

Do you take him back to Lake County?

THE MARSHALL: That's what will happen.

THE COURT: There's been a little delay, I wonder if he could see his children down there.

THE MARSHALL: That's not a decision for me.

THE COURT: Normally you don't allow visitation?

THE MARSHALL: Not at all.

THE COURT: If there would be any visitation here in the courtroom. I'll let him wait a few minutes, I'll [28] let him to talk to his children now.

(Short recess taken.)

THE COURT: Back on the record.

THE COURT: Mr. Williams, if you will come forward, please and Mr. Lynch.

THE COURT: I would like Miss Worlds, the probation officer, to indicate again in the presence of Mr. Williams, since the report you submitted on Friday will have to be revised, what your conclusions now is as to the sentencing options that the Court has?

MS. WORLDS: Pursuant to the career offender, your Honor?

THE COURT: Pursuant to the career offender provision of the guidelines 4B1.1 as well as the statute itself.

MS. WORLDS: Your Honor, pursuant to Count 2, the statute calls for a 20 year term, under the statute.

The guideline terms now, pursuant to the fact that the Defendant has found to be a career offender, the guide line range would be 168 months to 210, I believe it is.

However, in relationship to Count 3, there is a mandatory five year period, and in the particular case the five year period is consecutive pursuant to the statute, therefore the minimum term we are looking at presently would be 228 months, your Honor, that reflects the lower end of the [29] guideline range.

THE COURT: Is there anything, Mr. Williams, that you would like to say, yourself? You have a right to speak before any sentence is imposed, and I will be glad to hear from you, sir.

THE DEFENDANT: The only thing I can say to the Court is that if I could be given the chance I know I could make it in society as a citizen. Incarceration for 20 years, your Honor, I mean I know I made some mistakes, and I know I made a quite of few of them. I don't know if the answer justifies, I just don't know. I spoke to you in detail in a letter. That's the best I could do. I told you in the letter what the truth was. I just wish that had I foreseen any of this; it would have never happened.

THE COURT: Does the Government have any comments?

MR. SIERLEJA: Your Honor, the only comments I would have, in keeping with the plea agreement we would have no opposition to the low end of the range, the 228 months. I have nothing else to add.

THE COURT: Mr. Lynch.

MR. LYNCH: Nothing else, your Honor, except that I know this honorable Court's hands are tied by the sentencing guidelines and by the plea agreement, but I appreciate all of the thoroughness that the Court has shown in [30] this case.

THE COURT: There is an old that comes from our brothers who are American Indians and that saying is, "Until you walked in another person's moccasins, you can't really know what's going on in that person's mind."

And so it is, Earlus, I cannot know what things have transpired in your life, and I am not here to lecture you, you have chosen, you made choices, you say now some of them were the wrong choices.

I have the task of objectively dealing with you on the basis of the choices you made, and under the evidence which I heard from the police officers, I determined that the evidence that the two police officers presented should not be suppressed, nor should the evidence that they discovered in the car when you were arrested should not be suppressed, and then later you plead guilty to Counts 2 and 3.

The guidelines, and the applicable law, does fix a minute sentence of 228 months, and at this time, I impose that sentence of 228 months on you, sir. I'll not impose a fine. I am not satisfied that you have, despite the probation report, indicating that you may have some fanciful equity in this property. I doubt that you have anything left in that property and your wife tells me at side bar she is going to be losing the property in any event.

I don't know what restitution, if any, is available [31] there. I don't think there is any basis for restitution, is there, Miss Worlds?

MS. WORLDS: Not to my knowledge, there is not.

THE COURT: Very well, we will rule out restitution. Since there are two felonies involved here, and may I say going back to that sentence, I have to explicate it. It's a combination of the 168 months which is the lowest and of the guideline range for a violation of

Section 21 U.S.C. Section 841(a)(1) and 841(b)(1)(c) and then the 60 months which is the consecutive sentence which must be imposed under violation of 18 U.S.C. Section 924(c), and that's how we come up with the total of 228 months.

At this time, however, because there are two felonies, I must impose a $50 special assessment in connection of each felony for a total of a hundred dollars, and I do tell you now, Earlus, that by your pleas of guilty, you may not appeal the fact of the pleas of guilty, but you do have a right to appeal the sentence that I am imposing, and I would instruct, Mr. Lynch, I don't know, but if you think there is any possible basis after talking with Mr. Williams to file a notice of appeal, I would certainly direct you to do that with reference to the sentence that I am imposing.

MR. LYNCH: Thank you, your Honor. I would seriously consider that.

[32] THE COURT: Very well. I don't know of any other thing except where the sentence might be served, and I have learned that it's very difficult to recommend. Mr. Martin, what is the present situations?

MR. MARTIN: Based upon Bureau of Prisons designation, it's difficult to say where they will send Mr. Williams.

THE COURT: I know the last person that I recommend, he wound up in a wholly different place, and I don't think really recommending it, but again, if there is anything there that needs to be looked into, can you look into that? You have a count to dismiss.

MR. SIERLEJA: Yes, your Honor. I would move at this time for dismissal of Count 1 of the indictment.

THE COURT: Very well, Count 1 is dismissed. Is there anything further?

MR. SIERLEJA: Nothing further by the Government.

THE COURT: At this time, the sentence may go into effect.

MR. MARTIN: Your Honor, I believe, you would still have to inform the Defendant of the supervised release.

THE COURT: Oh, yes, absolutely. I'm glad you reminded me. Mr. Martin, the minimum release is three years, is that correct, Mr. Martin?

[33] MR. MARTIN: Yes, your Honor.

THE COURT: Once you are released from prison, you will be subject to a three year period of supervised release. That's the minimum that I can impose that is provided. That will be put into effect as well.

Anything further?

MR. SIERLEJA: Nothing, your Honor.

MR. LYNCH: Nothing further, your Honor.

(Court adjourned.)

(2)

No. 92-123

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

EARLUS LEON WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was properly classified as a career offender under the Sentencing Guidelines.

2. Whether the district court erred in not departing downward from the Guidelines sentencing range.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-123

EARLUS LEON WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A2, is unpublished, but its judgment is noted at 958 F.2d 372 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1992. The petition for a writ of certiorari was filed on June 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Northern District of Ohio, petitioner pleaded guilty to possession with intent to distribute cocaine, in violation

of 21 U.S.C. 841(a)(1), and use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). He was sentenced to 228 months' imprisonment. The court of appeals affirmed. Pet. App. A1-A2.

On February 12, 1990, following a high speed chase by police, petitioner lost control of his car and crashed into a stop sign. Upon petitioner's arrest, the police seized a revolver, some ammunition, 97.9 grams of cocaine, and cash from petitioner's car. Petitioner subsequently confessed to possessing the cocaine and the firearm. Gov't C.A. Br. 2.

Petitioner had two prior convictions for aggravated robbery and a conviction for drug possession. Based on those offenses, the probation office concluded that petitioner was a career offender under the Sentencing Guidelines. See Presentence Report 5-6. At the sentencing hearing, the district court requested documentary proof of petitioner's prior aggravated robbery convictions. After a short recess, the probation officer obtained a state journal entry showing that petitioner pleaded guilty to aggravated robbery in 1981. Pet. App. A12-A18. When the court asked petitioner for any objections to the record and the government's contention that he was a career offender under the Guidelines, petitioner replied that "I say, very reluctantly, I have to agree with the Probation Department's assessment that the career offender definition is fulfilled here." *Id.* at A21. After further inquiry, the district court obtained a report that showed that petitioner had been convicted on two separate aggravated robbery charges for which he had received concurrent sentences. *Id.* at A28.

Just before it imposed sentence, the district court held a side-bar conference with petitioner's wife to determine whether she wanted petitioner's children to be present in the courtroom when sentence was

imposed. The court told petitioner's wife that it would have preferred to sentence petitioner to a lesser term, but that under the Guidelines the court "ha[d] no discretion at all in imposing a lesser sentence, that's the way it is." Pet. App. A30. The court then sentenced petitioner as a career offender under the Guidelines.

The court of appeals affirmed. The court held that petitioner was correctly adjudged to be a career offender under the Guidelines. It also held that petitioner's contention that the district court improperly failed to depart downward from the Guidelines sentencing range was not cognizable on appeal. Pet. App. A1-A2.

ARGUMENT

1. Petitioner contends (Pet. 8-9) that his prior convictions for aggravated robbery do not qualify as convictions for a "crime of violence" under the career offender provisions of Sentencing Guidelines §§ 4B1.1 and 4B1.2. Petitioner forfeited that claim, however, because he specifically agreed at trial that he was properly classified as a career offender. Rights are lost if not timely asserted at trial. See *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); accord *Peretz* v. *United States*, 111 S. Ct. 2661, 2669 (1991). That principle also applies when a party agrees at trial that no error has been committed. See *United States* v. *Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990). Indeed, when a defendant or his counsel agrees to or acquiesces in a particular course of action at trial, it is clear that the parties have adverted to the issue and that the failure to object is not due to counsel's negligence or inattention. *Estelle* v. *Williams*, 425 U.S. 501, 510 (1976).

In any event, robbery is clearly a "crime of violence" under the Sentencing Guidelines, because rob-

bery "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(1)(i). Moreover, Application Note 2 to Sentencing Guidelines § 4B1.2 expressly lists robbery as a "crime of violence." The courts of appeals have uniformly held that robbery is a "crime of violence" under the Sentencing Guidelines, regardless of the facts of the particular crime at issue. See, *e.g.*, *United States* v. *Leeper*, 964 F.2d 751, 753 (8th Cir. 1992); *United States* v. *Mendoza-Cecelia*, 963 F.2d 1467, 1474 (11th Cir. 1992); *United States* v. *Spencer*, 955 F.2d 814, 820 (2d Cir. 1992); *United States* v. *Wilson*, 951 F.2d 586, 588 (4th Cir. 1991), cert. denied, 112 S. Ct. 2294 (1992); *United States* v. *Jones*, 932 F.2d 624, 625 (7th Cir. 1991); *United States* v. *McAllister*, 927 F.2d 136 (3d Cir.), cert. denied, 112 S. Ct. 111 (1991); *United States* v. *McDougherty*, 920 F.2d 569, 573-574 (9th Cir. 1990), cert. denied, 111 S. Ct. 1119 (1991); *United States* v. *McVicar*, 907 F.2d 1, 1-2 (1st Cir. 1990).*

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* Petitioner's reliance (Pet. 8) on *United States* v. *Flores*, 875 F.2d 1110 (5th Cir. 1989), and *United States* v. *Brunson*, 907 F.2d 117 (10th Cir. 1990), cert denied, 111 S. Ct. 1011 (1991), is misplaced. Each case in fact held that the defendant's burglary conviction qualified as a "crime of violence" under the career offender Guidelines.

Petitioner correctly observes (Pet. 8) that *United States* v. *Baskin*, 886 F.2d 383 (D.C. Cir. 1989), cert. denied, 494 U.S. 1089 (1990), permits a sentencing court to look at the facts underlying a defendant's prior robbery conviction to determine whether that conviction qualifies as a "crime of violence" under the Guidelines. 886 F.2d at 389-390. However, the District of Columbia Circuit also requires a defendant to request that the sentencing court consider the facts of his conviction to determine whether it qualifies as a "crime of violence" or whether a downward departure is warranted. *United States* v. *Bradshaw*, 935 F.2d 295, 303 (D.C. Cir. 1991). Because petitioner specifically agreed that his prior aggravated robbery

Moreover, petitioner's prior convictions were for aggravated robbery, not simply for robbery. Ohio law defines aggravated robbery as the theft of property from another by: (1) a deadly weapon or dangerous ordinance, or (2) inflicting or attempting to inflict serious physical harm on another. Ohio Rev. Code Ann. § 2911.01 (Anderson 1987). Ohio defines aggravated robbery as a crime of violence. Ohio Rev. Code Ann. § 2901.01(I) (Anderson 1987). Under either method of committing the offense, the Ohio crime of aggravated robbery obviously is a crime of violence within the meaning of Guidelines § 4B1.2(1). The offense of robbery while armed involves the threatened use of physical force against another, while the offense of robbery by inflicting or attempting to inflict physical force on another involves the use or attempted use of physical force against another. Accordingly, the sentencing court properly held that petitioner's prior aggravated robbery convictions qualified as convictions for a "crime of violence" under the career offender Guidelines.

2. Petitioner also argues (Pet. 10-11) that the district court denied him the right to be considered for a downward departure from the Guidelines by erroneously concluding that it had no authority to depart downward from the Guidelines range. First, petitioner has forfeited that claim because he did not request a downward departure at trial. See *United States* v. *Bradshaw*, 935 F.2d 295, 303 (D.C. Cir. 1991); see generally *Yakus* v. *United States*, *supra*; *Peretz* v. *United States*, *supra*. Second, petitioner's claim is not supported by the record. The district court did not hold that it had no authority to depart downward from the Guidelines sentencing range. Petitioner

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conviction qualified as a "crime of violence," *Baskin* does not assist him.

relies on the court's statement that it had no discretion to impose a lesser sentence on petitioner, but the court made that statement to petitioner's wife during a side-bar conference to determine whether she wanted petitioner's children to be present during the imposition of sentence. In context, the court was simply explaining to a layperson that the court was required to sentence petitioner under the Guidelines, rather than to impose a sentence at the court's discretion. The court's remark was a casual aside, not a ruling of law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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